No. 83-697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

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ARGUMENT

The one point on which the parties and the *amici curiae* agree is that this first substantial revision of the original Davis-Bacon regulations promulgated contemporaneously with that Act's passage in 1935 is of great practical consequence to a multibillion dollar government procurement program and to the level of labor standards in construction—the nation's largest industry. That was the Secretary of Labor's stated view in issuing the challenged regulations and in opposing a stay of the Court of Appeals' mandate. See 46 Fed. Reg. 41444 (Aug. 14, 1981); Opposition to Motion to Stay Mandate in C.A.D.C. Nos. 83-1118 etc. p. 4. And those statements are unwittingly confirmed by the filing of two briefs *amicus*

curiae—one by Associated General Contractors of America and the other by the Public Service Research Council —both of which reflect the intense desire of substandard contractors to maintain the economic advantage granted by the challenged regulations and the concern that those regulations could not survive review in this Court under the proper legal standards stated in *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual*, —— U.S. ——, 51 L.W. 4953 (June 24, 1983). Despite the Secretary's soothing assurances, that concern is well warranted; the attempted defenses of the decision below further confirm that the decision cannot be squared with this Court's precedents.

I.

(a) Like the Court of Appeals' opinion, the Secretary's brief in opposition places heavy emphasis on the proposition that his challenged regulations are properly characterized as "legislative" rules and that such rules are *ipso facto* entitled to special judicial deference. Br. in Opp. 11-13; see also AGC Br. 3-6.[1] But, even if it be assumed that the "legislative" appellation is of critical importance here, that does not justify the Court of Appeals' overly lenient standard of review. This is established by *Motor Vehicle Mfrs.* The airbag and seat belt regulations considered there were quintessentially legislative and were set aside as "arbitrary and capricious" when judged by the very standards applied by the District Court here and emphatically rejected by the Court of Appeals. See especially 51 L.W. at 4956, quoted at Pet. 11-12. That simple fact utterly destroys the claim that changes in leg-

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[1] Throughout this reply: the petition for a writ of certiorari and accompanying appendix will be referred to as "Pet." and "Pet. App." respectively; the brief for the respondents in opposition will be referred to as "Br. in Opp.", the briefs *amicus curiae* of the Associated General Contractors of America, Inc. and of the Public Research Council will be referred to as "AGC Br." and "PSRC Br." respectively; and the respondents will be referred to as "the Secretary."

islative rules are entitled to special judicial deference and confirms that the Court of Appeals in granting such deference proceeded on a mistaken understanding of the judicial role.[2]

(b) The approach of the Court of Appeals is captured in the Secretary's statement that an administrator "may alter [his] past interpretation and overturn past administrative rulings and practice." Br. in Opp. 13, quoting *American Trucking Ass'n v. Atchison, T.S. F. Ry.*, 387 U.S. 397, 416. But that is only half the governing rule; as a later case involving the Santa Fe makes clear, an administrator in exercising that power must justify the alteration and must do so in a manner that overcomes the "*presumption that* [*Congress'*] *policies will be carried*

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[2] The simplistic wordplay by which the Court of Appeals and the Secretary would assimilate the challenged regulations in this case to the legislative rule at issue in *Batterton* v. *Francis*, 432 U.S. 416 is entirely inadequate in its own right. The Secretary says that "the key statutory language delegating regulatory authority under the Davis-Bacon Act—'determined by the Secretary'—is virtually identical to that under consideration in [*Schweiker* v.] *Gray Panthers*, [453 U.S. 34] and *Batterton*." Br. in Opp. 11. But plucking those four words out of context is as informative as quoting a statutory prohibition without stating the nature of the offense or the penalty. It is the language following thereafter and delineating the *scope* of the delegation that is the heart of the matter. And it is in this respect that the delegations in the Social Security Act involved in those cases differs *toto coelo* from that in the Davis-Bacon Act. In the Social Security Act Congress spoke in the most general possible terms in granting the HEW Secretary authority to "prescribe[] . . . standards" without further specification. In contrast in the Davis-Bacon Act Congress stated that the "wages that will be determined by the Secretary of Labor" are "to be *prevailing* for the *corresponding classes of laborers and mechanics* employed on *projects of a character similar to the contract work* in the *city, town, village, or other civil subdivision of the State in which the work is performed* . . . ." 40 U.S.C. § 276a. There is nothing in this language which authorizes the Secretary of Labor to set his own standard as to what constitutes a "prevailing . . . wage," a "class of laborers and mechanics", or a "project of character similar to the contract work." Yet that is exactly what the Court of Appeals said the Secretary of Labor may do here.

out best if the settled rule is adhered to." *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808, quoted in *Motor Vehicle Mfrs.*, 51 L.W. at 4956 (emphasis added).

Thus, both the rationale and the result in *Motor Vehicle Mfrs.* refute the Court of Appeals' and Secretary's thesis that in assesing an initial regulation and a change in a long-standing regulation "the ultimate legal issue remains the same: Is the agency action within the scope of statutory discretion?" Br. in Opp. 12. The *Motor Vehicle Mfrs.* Court decided that the Transportation Secretary in changing a prior regulation failed to adequately justify an exercise of a discretion narrowed by the presumption in favor of retaining the prior regulation. As was stated by District Court in this case, following *Norwegian Nitrogen Co. v. U.S.*, 288 U.S. 294, 315, and anticipating *Motor Vehicle Mfrs.*:

> [W]hen an agency abruptly changes a longstanding administrative position, regardless of the context, it may be expected at a minimum to show that the earlier understanding of the statute was wrong or that experience has proved it to be defective. As indicated *supra*, the Secretary has done neither; his primary reliance throught has been on cost and cost savings—matters neither of novel experience nor of special expertise, but well known and considered by the Congress as early as 1931. [Pet. App. 63a-64a, footnote omitted; see also *id.* at 60a-63a quoted in part at Pet. 9-10]

Neither the Secretary's explanation and justification of the challenged regulations, the Court of Appeals' decision nor the brief in opposition makes such a showing for all mistakenly deny that there is any need to do so.

(c) *Motor Vehicles Mfrs.* makes clear that, "[n]ormally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." 51 L.W. at 4956, quoted at Pet. 12. *A fortiori* it is arbitrary and capricious for an

administrator to make such a change on a ground *opposed to* the congressional policy of the statute. Consider, for example, what short shrift the airbag regulation at issue in *Motor Vehicle Mfrs.* would have received from this Court if the Secretary of Transportation had sought to justify that regulation on the ground, among others, that airbags would be *too* safe, thereby diminishing the thrill of driving, or what the result would have been if the regulation in *Schweiker v. Gray Panthers*, 453 U.S. 34 (Br. in Opp. 11-12) had rested on the Social Darwinist theory that the medically needy should not be given aid because to do so undermines their self-reliance. Yet the Secretary of Labor has done the equivalent here by focusing in the preamble to the challenged regulations, and in the regulatory impact analysis (summarized in the preamble), on the cost aspects of those regulations and on the proposition that by lowering wage rates the regulations save money to the Federal Government.

The brief in opposition does not controvert our showing (Pet. 14) that this rationale is inconsistent with the purpose of the Act; that brief maintains a discreet silence on the subject. *Amicus curiae* PSRC, however, embraces as sound the proposition that "consideration by the Secretary of public policy concerns such as cost savings to the taxpayers under the proposed regulations," is in accord with law. PSRC Br. 14, heading. The arguments of the employer associations and others emphasizing the desirability of a greater emphasis on cost saving and a lesser emphasis on labor protections quoted *id.* at pp. 15-18 were properly presented to *Congress*, which has the power to modify the Davis-Bacon Act by adopting the substance of any or all of the Secretary's regulations, or of repealing the Davis-Bacon Act altogether.[3] Congress

[3] That Congress declined the proffered opportunity to eliminate the historic 30% rule for determining the prevailing wage (see testimony of Mr. Fettig quoted at PSRC Br. 15), is an additional ground for invalidating the present Secretary's elimination of that rule by administrative fiat.

to this point has refused to do so. On the contrary, as the Secretary concedes:

> Since 1935, Congress has extended the Act's prevailing wage requirements by statute to many other federal and federally-assisted construction programs, generally by requiring payment of wages determined in accordance with the Davis-Bacon Act. [Br. in Opp. 2; see also Pet. 7-8]

And on many of those occasions Congress has considered and rejected the argument that the Act imposes unacceptable costs on the Government.

The Secretary was duty bound to follow the policy of the law as Congress declared that policy, and since the Secretary violated that obligation it was the Court of Appeals' responsibility, which was not discharged, to set the challenged regulations aside as "arbitrary, capricious [and] not in accordance with law."

(d) The Court of Appeals' difficulty in grasping the correct approach to judicial review of changes in long-standing administrative rules is not a passing phenomenon. Its more recent decision in *ILGWU et al. v. Donovan et al.*, —— F.2d —— (C.A.D.C. No. 82-2133; Nov. 29, 1983) shows that on this critical question that cuts across the entire field (Pet. 6-7) the instant decision sows continuing confusion. Given the District of Columbia Circuit's heavy administrative law docket and the fact that every regulation adopted by a federal administrator is subject to review in that circuit, intervention by this Court is urgently required.

In the instant case the Court of Appeals relied on the proposition that in reviewing regulations on how a statute is to be enforced "our deference to [the administrator's] choice is properly near its greatest." Pet. App. 37a.[4] The *ILGWU* case concerned such an enforcement

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[4] This statement was made in the context of approving the challenged "helpers" regulation. We show hereafter (*infra* pp. 10-11) that this is an incorrect characterization of the legal question presented by that regulation.

regulation and one as to which, in contrast to the instant case, Congress provided no explicit statutory guidance whatsoever. "That action ar[ose] out of the decision of the Secretary of Labor (hereinafter the Secretary) to rescind longstanding restrictions on the mployment of workers in their home (homeworkers) in the knitted concern "that when homeworkers are employed it is not possible effectively to enforce the minimum wage, overtime compensation and child labor provisions of the Fair Labor Standards Act of 1938." *ILGWU* Sl. Op. 2. Yet the Court of Appeals decision overturning the Secretary's new homeworker regulations contains a six page section entitled "Scope of Review" that does not so much as use the word "deference." See *id.* at 30-36. Rather, in *ILGWU* the Court of Appeals recognized and gave weight to the consideration that:

> [T]his case involves review of an agency's rescission of a longstanding policy. . . . This settled course of behavior truly embodied the Division's informed judgment that restricting homework would best carry out the policy dictated by Congress. . . The Division's adherence to the restrictions between 1942 and 1980 is a reflection of the widespread and persisting decision that restriction of homework was a prerequisite to effective enforcement of the Act. [*ILGWU* Sl. Op. 31-33.]

And based on that recognition, in *ILGWU* that court concluded:

> Our review of the Secretary's decision is not merely perfunctory. We are to engage in a searching and careful inquiry, the keystone of which is to ensure that the Secretary engaged in reasoned decisionmaking. [*Id.* at 36.]

If the foregoing strikes a familiar note it is not surprising, for these words are all but identical to the words of the District Court in the instant case. See Pet. App. 61a-62a. In this case, of course, that court was rebuked by the Court of Appeals for placing "heavy reliance on

[prior long-standing] administrative practice. . . ." Pet. App. 15a. In order to paper over this discontinuity the Court of Appeals now suggests a novel distinction: "Unlike *Building & Construction Trades' Dep't*, the instant case does not involve a claim that the applicable statute precludes rescission of longstanding policy; instead, the issue is whether the rescission was 'arbitrary and capricious.'" *ILGWU* Sl. Op. 34 n.32. This distinction, we submit, exacerbates the problem the Court of Appeals itself created by its erroneous approach in this case.

According to the Court of Appeals there are two discrete classes of cases—cases in which the "only" claim is that a change in long-standing regulations is contrary to quite specific statutory language, its legislative history, the overall statutory purpose and the contemporaneous interpretation of the legislative materials, and cases in which the claim is that there is not a fully articulated basis for the change—and in the former class of cases the courts are to accord the administrator more deference than in the latter. This Court has never drawn such a line of demarcation. The point of Congress' statutory directives is to set the limits of administrative discretion and the point of judicial review is to establish what those directives mean and to assure that Congress' intent once established is respected. The general requirement stated in the phrase "reasoned decisionmaking" and the more particular requirement embodied in the "presumption . . . against changes in the current policy that are not justified by the rulemaking record" (*Motor Vehicle Mfrs.*, 51 L.W. at 4956) are means to that *single* end. To be sure there are differences in degree but those differences cut in just the opposite direction from the one the Court of Appeals is taking; the more specific the legislative directives, the *heavier* the weight to be accorded contemporaneous interpretations and the *stronger* the presumption against change that the administrator must overcome.

II.

The Secretary contends that "petitioners make no showing whatever [that] three of the challenged regulations" are "arbitrary, capricious or otherwise not in accordance with law." Br. in Opp. 13. This contention disregards the showing in point I of the petition, elaborated above, that under a proper standard of review the Secretary's actions in overturning longstanding regulations adopted contemporaneously with the statute, without providing a justification that overcomes the presumption against such changes recognized in *Motor Vehicle Mfrs.*, is not "in accordance with law." While the challenged "helpers" regulation is fatally defective for the same reason, there are two additional reasons why that regulation should have been set aside by the Court of Appeals.

(a) The Secretary concedes the basic premise of our challenge to the "helpers" regulation by stating that petitioners "correctly point out (Pet. 15) that the statutory language, as well as the legislative history, indicates that each class of laborers and mechanics for which a wage schedule is to be established would be differentiable. Otherwise, employers could evade wage requirements by misclassifying workers." Br. in Opp. 14. Nevertheless the Secretary argues that "the basis for distinguishing between classes of laborers and mechanics need not be 'task-oriented'; nothing in the statute prohibits the Secretary from drawing a distinction—as he has here—on the basis of degree of supervision." *Id.*

The assertion that "there is nothing in the statute" prohibiting the Secretary's "degree of supervision" distinction is accurate only in the trivial sense that Congress did not in the express statutory language require a task-oriented definition. For that assertion begs the critical question whether Congress in using the phrase "classes of laborers and mechanics" intended to delegate to the Secretary the power to define classes on whatever basis the Secretary chose. We submit that Congress had no such intent.

The 1935 Act was the product of Congress' concern over the misclassification of workers by such devices as the use of "intermediate classifications" and the "hiring [of] mechanics as common laborers, and then assigning them to *tasks* which fell within the purview of one of the skilled crafts." Pet. 19 quoting the 1935 Senate Report (emphasis added). It would appear then that Congress had a "task-oriented" definition in mind. And if that is not dispositive, to the extent the statute is construed to grant the Secretary *some* discretion in defining classes it does not follow that he is empowered to "draw[] a distinction * * * on the basis of degree of supervision." Br. in Opp. 14. That criterion, or any other, is permissible only if the admitted congressional objective of preventing employers from "evad[ing] wage requirements by misclassifying workers" (*id.*) is advanced by its adoption. It is difficult to conceive of a criterion more evanescent and more conducive to evasion than one based on the "*degree* of supervision," particularly the degree of supervision provided by journeymen who by definition are *not* supervisors at all and who under the challenged regulation would be doing *exactly the same work* as the helpers those journeymen are supposedly supervising. Certainly the Secretary does not give a hint as to how enforcement of the challenged regulation could possibly be accomplished or even of a recognition that it is his particular responsibility under the statute to adopt criterion that facilitate enforcement. This in itself invalidates the regulation.

Moreover, the determination of the scope of the delegation to the Secretary to define "classes of laborers and mechanics" is one which should have been made by the ocurt below *without any deference to the Secretary's expansive view of his own authority.* As this Court has explained, "An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board v. Nierotko*, 327 U.S. 358; 369, quoted with approval in *Batterton*, 432 U.S. at 425, n.8. Yet the

Court of Appeals, in a passage underlined by the Secretary, sharply circumscribed its review on the theory that "judicial deference to agency decisions 'is properly near its greatest' on questions of the relative enforceability of different approaches to administering a statute." Br. in Opp. 17 quoting Pet. App. 37a. While unexceptionable where Congress has only established statutory norms, and left questions of enforcement entirely to an administrator, that principle is plainly inapplicable where Congress itself has addressed the question of enforceability and has crafted the statute to prevent evasion. To accord deference to the administrator's determination on enforceability in that situation, which is admittedly the situation in this case, is to allow the administrator to impermissibly substitute his own judgment for that of Congress.

(b) The brief in opposition further impeaches the Secretary's "helpers" regulation by stressing that the regulation was adopted for reasons extrinsic to the enforcement purpose of the "classes" concept, and indeed to any of the purposes of the Davis-Bacon Act. The Secretary asserts that we disregard certain of his reasons for the regulatory change

> including increasing job opportunities for less skilled workers, especially young people, women, and members of minority groups now frozen out by restrictive federal requirements limiting the demand for semi-skilled labor, encouraging job training, increasing productivity, and enabling a broader class of contractors to compete for government work. See 47 Fed. Reg. 23651 (1982). [Br. in Opp. 14-15; see also PSRC Br. in Opp. 18-20.]

We did not "disregard" the Secretary's reliance on these factors because we considered such reliance to be harmful to our position; rather, mindful of the admonition of this Court's Rule 21.5,[5] we resisted the tempta-

[5] "The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

tion to present a Leporellonian catalogue of the Secretary's sins of commission. For, as we have observed above, *Motor Vehicle Mfrs.* teaches that "[n]ormally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." 51 L.W. at 4956. Under this principle of judicial review the "helpers" regulation is clearly "arbitrary and capricious" because none of the above-listed "other reasons stated by the Secretary for the regulatory change" (Br. in Opp. 14-15) are even arguably germane to the Secretary's assigned task of determining what "wage" is "prevailing."[6]

The Secretary's reliance on these factors is not only legally impermissible, it is factually inaccurate. When this point was argued to the District Court, Judge Greene, who came to the local and federal bench after distinguished service in the Civil Rights Division of the Justice Department, wrote:

> As for the argument of the *amicus* that increased use of the helper classification promotes employee opportunity, it appears that as of 1978 minority participation in joint union-management apprenticeship programs was 21.2 percent while its participation in

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[6] There is closely analogous precedent in this Court which confirms the impropriety of the Secretary's reliance on the most attractive of these "other reasons", namely providing job opportunities to "young people, women, and members of minority groups." In *NAACP* v. *FPC*, 425 U.S. 662, the Court held that although "the elimination of discrimination from our society [clearly] is an important national goal" (*id.* at 665), the FPC "is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees *only* insofar as such consequences are directly related to the Commission's establishment of just and reasonable rates in the public interest," (*id.* at 671, emphasis added). In *NAACP* v. *FPC* there was such a relationship between rates and "illegal, duplicative or unnecessary labor costs" which "are demonstrably the product of discriminatory practices." *Id.* at 668. In this case the Secretary does not even claim that *any* relationship exists between his "other reasons" for the challenged "helpers" regulation and achieving the purposes of the Davis-Bacon Act.

> open-shop trading programs was only 11.4 percent. Department of labor data tabulated for Union and Open Shop Construction, p. 71 (1978). The regulation adopted by the present Secretary is likely to have the effect of allowing contractors to replace higher wage minority laborers with lower wage minority helpers. [Pet. App. 73a, n.4]

This finding was not disturbed by the Court of Appeals which in sustaining the regulation did not advert to the Secretary's "reliance" on these factors.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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